

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

One
76-7422

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REGINALD V. SCHMIDT,

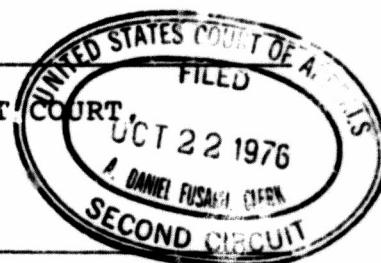
Plaintiff-Appellant,

-v-

RAYMONT T. MCKAY and JOHN F. BRADY,
representatives of a class of
persons who were members of District
2 - Marine Engineers Beneficial
Association - AFL-CIO in September
1971,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK



JOINT APPENDIX

ANDERSON RUSSELL KILL & OLICK, P.C.
Attorneys for Plaintiff-Appellant
630 Fifth Avenue
New York, New York 10020
(212) 397-9729

MARKOWITZ & GLANSTEIN
Attorneys for Defendants-Appellees
50 Broadway
New York, New York 10004
(212) 561-5561

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	Page
Docket Entries.	1a
Second Amended Complaint.	52
Answer to Second Amended Complaint.	132
Stipulation Amending Second Amended Complaint.	19a
Memorandum and Order of District Court dated August 5, 1975, entered on August 11, 1975	21a
Memorandum and Order of District Court dated August 6, 1976, entered on August 9, 1976.	24a
Excerpts from Deposition of Plaintiff-Appellant taken on April 10, 1975.	31a
Letter of Plaintiff-Appellant to Defendant-Appellee Brady sent on September 22, 1967	78a
Affidavit of Thomas J. Mackell, Jr. dated June 7, 1976	81a

720 1595~

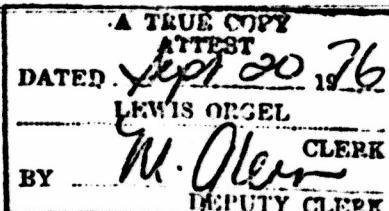
DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED EMOLUMENT RETURNS
11/27/72	Complaint filed Summons issued	1JS5
1-2-73	Summons returned and filed/executed.	2
1/3/73	By Neaher, J.—Order dtd 12/29/72 extending defts' time to answer to complaint to 1/23/73 filed	3
1/17/73	3 By Neaher, J.—Order dtd 1/15/73 extending the deft's time to answer to complaint to 1/23/73 filed.	4
1/22/73	Answer filed (MC KAY)	5
3-6-73	Notice of motion to strike insufficient defense and memo of law in support ret 3-12-73 filed.	6/7
3/12/73	Before TRAVIA, J.—Case called for hearing on motion to strike insufficient defense. Adj'd. to 3/30/73 at 10:00AM.	
3/15/73	Defts. Memorandum of law in opposition to pltffs. motion filed.	8
3-29-73	Copy of letter from Jerold Oshinsky dtd 3-27-73 re motion to strike adj'd to 4-6-73 filed.	
—	—	9
3-30-73	Before TRAVIA, J. — Case called & adj'd to 4-6-73.	
4/6/73	Before TRAVIA, J.—Case called for hearing on motion to strike insufficient defense—Adj'd. to 4/13/73 at 10:00 AM	
4/12/73	Defts. Interrogatories filed.	10
4/13/73	Before TRAVIA, J.—Case called for hearing on motion to strike insufficient defense—Defendants motion to dismiss complaint—Motion granted—Submit order.	
5-16-73	By TRAVIA, J. — Order dtd 5-15-73 denying pltff's motion to strike and granting defts' motion to dismiss complaint filed. (p/c mailed to attys).	
6-8-73	Notice of appeal and bond undertaking for costs on appeal filed. Duplicate of appeal & duplicate of docket entries mailed to C of A. Duplicate of appeal mailed to attys. jn	11
7-18-73	Record on appeal certified and handed to Barbara Zuckerman for delivery to the Court of Appeals.	12/13
2-6-74	Certified copy of judgment received from CofA vacating judgment of district court & remanding action with leave to amend the complaint filed. jn	14
3-6-74	Before BRUCHHAUSEN, J. — Case called & adj'd to 5-29-74.	TS
4-18-74	Amended complaint filed (demand for jury trial).	15
5/1/74	By BRUCHHAUSEN, J.—Order dtd 5/1/74 extending time for defts to answer amended complaint to 5/23/74 filed.	16
5/23/74	ANSWER of deft filed (to amended complaint)	17

Continued

2a

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES		AMT REPO EMOL NET
		PLAINTIFF	DEFENDANT	
10/22/74	Notice of Motion to dismiss for lack of diversity jurisdiction, ret. Nov. 7, 1974 filed.			13
10/22/74	Memorandum of Law in Support of defts' motion to dismiss for lack of subject matter jurisdiction filed.			19
11-7-74	Pltff's answers to interrogatories filed.			20
11-7-74	Pltff's memorandum of law in opposition to defts' motion to dismiss complaint filed.			21
11/7/74	Before BRUCHHAUSEN, J.- Case called- Motion to dismiss argued- Decision reserved.			
11-13-74	Notice of motion ret. 11-18-74 for an order to dismiss the amended complaint, etc. & memorandum of law in support of defts' motion filed.			22/
11-27-74	Order By BRUCHHAUSEN, J.-dtd 11-27-74 dismissing complaint filed. (p/c mailed to attys)			24
11-29-74	JUDGMENT dtd 11-29-74 dismissing complaint filed.			25
12-5-74	Notice of motion and memorandum of law for reargument ret 12-16-74 at 10 A.M. filed.			26/2
12/24/74	Deft's Memorandum of Law in Opposition to Pltff's Motion for Re-argument and for Leave to file a second amended complaint filed.			
1/2/75	Pltff's Reply Memorandum of Law in Support of Motion for Reargument and for leave to file a second amended complaint filed.			
1-3-75	Before BRUCHHAUSEN, J.-Submitted. Decision reserved.			
1/9/75	By BRUCHHAUSEN, J.- Memorandum and Order dated 1/8/75 filed that all discovery be completed on or before 5/1/75, etc. Copies of Order forwarded to all parties. Leave is granted to file second amended complaint within 20 days of this order.			
1-21-75	Second amended complaint filed., with jury demand.			1/25
1/31/75	Affidavit of Service on Firm of Markowitz and Glanstein filed.			
2-10-75	Answer to second amended complaint filed.			
5/30/75	Notice of Motion, ret. 6/16/75 filed re: determining that defts R. McKay and J. Brady will fairly and adequately protect the interests of those persons who were members of District 2, etc.			
5/30/75	Pltff's Memorandum of Law filed.			
6-16-75	Notice of motion ret. 6-23-75 for an order dismissing the second amended complaint as to defts McKay & Brady, etc. & memorandum of law in support of motion filed.			

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
7/10/75	Pltff's Reply Memorandum of Law in Support of Motion filed.			38
7-18-75	Deft's reply memorandum of law in support of motion to dismiss filed.	39		
8-11-75	By BRUCHHAUSEN, J.-Memorandum and Order dtd 8-5-75 that this cause may proceed as a class action, and that all claims against individual defts, McKay and Brady, are dismissed. See memo.			40
11/21/75	Notice of Motion, ret. 12/1/75 filed re: for summary judgment-deft			41
11/21/75	Memorandum of Law in Support of Deft's motion s for Summary Judgment and to dismiss filed.			42
XX/XX/XX				
5-5-76	By BRUCHHAUSEN, J.-Notice of pendency of class action filed.			43
5-21-76	Deposition transcript of J. F. Brady filed. p/c			44
5-21-76	Depisiton transcript of Raymond T. McKay and C. B. Richardson filed.			45
5-25-76	Pltff's memorandum of Law filed.			47
6-8-76	Before BRUCCHAUSEN, J.- Case called for defts motion for summary judgment Motion submitted Decision reserved			
6-10-76	Letter dtd. 6-8-76 from J. Doyle to Clerk, re: change of office address for pltff's attys filed.			48
7-26-76	Telegran to Clerk from from S. Weinhouse Esq. re notice of appearance.			49
7-26-76	Notice of appearance of Edward Skorupski filed.			50
7-26-76	Notice of appearance of S. Sheldon Weinhaus filed.			51
7-27-76	Telegram fróm E. Skourupski dtd 7-26-76 re notices of appearance.			52
7-28-76	Notice of appearance for Francis W. Keeley, Carl L. Sorenson, Jesse E. Melton and Vahram Guzelian filed.			53
8-3-76	Notice of appearance for McDougal filed.			54
8-3-76	Notice of appearance for Fertig filed.			55
8-5-76	Notice of appearance forx defts filed.			56
8-9-76	Notice of appearance for James Wingate filed.			57
8-9-76	By BRUCHHAUSEN, J. Memo & Order dtd 8-6-76 dismiss in the second amended complaint filed. Copies mailed from Chambers.			58
8-10-76	Judgment taht the pltff take nothing of the deft and that the second amended complaint is dismissed filed.			59
8-23-76	Notice of appeal filed. Copy mailed to deft and C of A.			60
8-23-76	Undertaking for costs on appeal filed.			61
8-27-76	Letter dtd 8-25-76 to Clerk from E. Skorupski filed.			62
9-9-76	Civil appeal scheduling order #1 filed.			63
9-16-76	Letter dtd 9-7-76 re misspelling of Skorupski's name			64



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
REGINALD V. SCHMIDT,

Plaintiff,

v.

RAYMOND T. MCKAY and JOHN F.
BRADY,
as representatives of a class
of persons who were members of Dis-
trict 2 - Marine Engineers Beneficial
Association - AFL-CIO in September
1971,

Defendants.

-----x
: SECOND AMENDED COMPLAINT

: PLAINTIFF DEMANDS TRIAL
: BY JURY

72 Civ. 1595 (WB)

Plaintiff, Reginald V. Schmidt, by his attorneys
Anderson, Russell, Kill & Olick, P. C., as and for his
second amended complaint herein, alleges as follows:

JURISDICTION AND VENUE

1. Plaintiff is a citizen of the State of Florida
and the defendant, Raymond T. McKay ("McKay") is a citizen
of the State of New Jersey and the defendant, John F. Brady
("Brady") is a citizen of the State of New York. The matter
in controversy exceeds, exclusive of interest and costs,
the sum of ten thousand dollars. This Court has jurisdiction
of this action under Title 28 U. S. C. Section 1332. The
acts and practices complained of herein occurred in large
part within the Eastern District of New York and the claims
asserted herein arose in said District.

THE PARTIES

2. At all times relevant to this Complaint, McKay has been President of District 2 - Marine Engineers Beneficial Association - AFL-CIO ("MEBA"), an unincorporated association with headquarters in Brooklyn, New York, and Brady has been Secretary-Treasurer of MEBA. The other defendants consist of all the persons who were members of MEBA in September 1971. The word "class" as hereinafter used refers to McKay, Brady and said other defendants.

3. From January 1946 to December 1947, plaintiff was a member in good standing of Local 33, Marine Engineers Beneficial Association, a predecessor union of MEBA. From on or about May 15, 1948, until on or about the date of the filing of the original Complaint, plaintiff was a member in good standing of MEBA.

4. From December 1947 until November 1966, plaintiff was employed as an engineer by the Cities Service Tanker Corporation ("Cities Service"), an employer with whom MEBA had no collective bargaining agreement. Thereafter, until his retirement on or about March 1, 1971, plaintiff was employed as an engineer by various employers with whom MEBA had collective bargaining agreements.

CLASS ACTION

5. The plaintiff brings this action against the defendants, McKay and Brady, individually and as representatives of the class pursuant to Rule 23.2 of the Federal Rules of Civil Procedure. The defendants, McKay and Brady will

fully and adequately protect the interests of the class.

FIRST CLAIM

6. In May 1966, MEBA was engaged in an intensive effort to organize the Engineers employed by Cities Service ("Cities Service Engineers") and to persuade them to select MEBA as their bargaining representative. As of May 12, 1966, two elections had been held by the Cities Service Engineers resulting in tie votes.

7. On or before May 12, 1966, McKay and Brady sought plaintiff's active support for MEBA's campaign to organize the Cities Service Engineers ("Campaign"). Plaintiff promised McKay and Brady that he would actively support MEBA if MEBA would assure him full pension rights upon retirement regardless of the outcome of the Campaign. In order to induce plaintiff to lend his active support to the Campaign, McKay orally promised plaintiff that whether or not MEBA successfully organized Cities Service, MEBA would assure inclusion of plaintiff in the MEBA Pension Plan with full benefits therein for plaintiff upon his retirement.

8. On or about May 12, 1966, in order further to induce plaintiff to support the Campaign, McKay, on behalf of MEBA, wrote a letter to plaintiff aboard the S.S. "Council Grove" (which letter is attached hereto as "Exhibit A")*, stating in part, that Cities Service was about to violate an agreement with MEBA not to negotiate with a competing union. In order to again enlist plaintiff's support for the Campaign and, in addition, for MEBA's

* All Exhibits are attached to original Complaint

efforts to discourage Cities Service from violating said agreement, McKay promised as follows in his capacity as President of MEBA (Exhibit A):

* * * *

"Despite these occurrences (Cities Service's breaches of promise), however, District 2 makes the following additional commitment to all the Engineers employed by the Cities Service Tankers Corp.:

A) District 2 MEBA will satisfactorily conclude with the Trustees of the District 2 MEBA Pension Plan an arrangement permitting the Plan to pick up all the past service credits of any Engineer who supports District 2 MEBA in its current action against the violation of the election agreements--regardless of how this action comes out.

B) District 2 MEBA further guarantees that in the unlikely event that A) above is not accomplished by the Trustees' action, District 2 MEBA will make the appropriate contributions in behalf of said Engineers supporting District 2 MEBA in this action, with the result that the past service credits of the Engineers supporting District 2 MEBA will be totally accredited to their accounts for pensions from the District 2 MEBA Pension Plan.*

* * * *

The aforesaid letter was written in and sent from the Eastern District of New York.

9. On or about May 26, 1966, McKay and Brady wrote a letter (attached hereto as Exhibit "B") on behalf of MEBA to all Cities Service Engineers including plaintiff, enclosing copies of the text of Exhibit "A" (which previously had been sent not only to plaintiff, but to all engineers on the S.S. "Council Grove"), explaining that Cities Service had "reconsidered" its threatened violation of its agreement with MEBA. The letter added that further action against Cities Service nevertheless might be necessary, and specifically confirmed the promises previously made to plaintiff in Exhibit "A." In pertinent part, McKay and Brady stated on behalf of MEBA in Exhibit "B" as follows:

* * * *

"Should the Company refuse to agree to fair election conditions and permit the election to progress without prejudicial interference, we will then institute our original plan and take the necessary action to protect the engineers that have expressed their desire for District 2 representation.

"We sincerely hope this regrettable action will not be necessary, but if it is, then the terms, commitments and conditions for the COUNCIL GROVE Engineers (as set forth in Exhibit "A") will apply to all Cities Service Engineers."

* * * *

The aforesaid letter was written in and sent from the Eastern District of New York.

10. In reliance upon the promises set forth hereinabove in paragraphs 7, 8 and 9, plaintiff took over the direction of a picket line on behalf of MEBA at the S.S. "Bradford Island," a Cities Service vessel docked at Mobile, Alabama, during the period from October 26, 1966 to November 16, 1966, for the purpose of supporting MEBA in its Campaign. This strike action prevented the vessel from sailing for at least three weeks and permitted MEBA successfully to organize the Engineers and Mates on the "Bradford Island."

11. Plaintiff's actions in support of MEBA as described in paragraph 10 hereinabove were undertaken at the personal request of Brady and with the full knowledge and encouragement of McKay and Brady and other members of the class.

12. Plaintiff's actions in support of the Campaign as described in paragraph 10 hereinabove were undertaken at considerable danger to his person, and at great risk to his future employment by Cities Service. As a result of plaintiff's actions in support of the Campaign, Cities Service advised him that the only job for him would be as a Second Assistant Engineer, whereas previously plaintiff had been employed by Cities Service as a

First Assistant Engineer. By reason of this demotion, plaintiff was forced to quit his employment with Cities Service.

13. Upon plaintiff's retirement, he submitted an application to the MEBA Pension Plan for his pension. At the time of his retirement, plaintiff was fully qualified for complete pension benefits under the terms of the MEBA Pension Plan.

14. On September 1, 1971, Thomas E. Flintoft, Claims Coordinator of the MEBA Pension Plan, wrote to plaintiff rejecting the application and stated that plaintiff was not eligible for a pension. The aforesaid letter was written in and sent from the Eastern District of New York.

15. The promises of McKay and Brady set forth in paragraphs 7, 8 and 9 hereinabove were given for a valid consideration, with full authority to act upon behalf of the members of MEBA, and in view of plaintiff's performance in accordance with such promises, constitute a contract binding upon the class. Plaintiff fully performed the conditions on his part under the contract.

16. McKay, Brady and the other members of the class have breached their contract with plaintiff by failing to (a) conclude with the Trustees of the MEBA Pension Plan an arrangement whereby plaintiff would be included in the Pension Plan with full credit for all prior service; (b) make the appropriate contributions on behalf of plaintiff with the result that he would be included in the Pension Plan with full credit for all prior service; or (c) otherwise assure that he would receive all benefits afforded by the Pension Plan with full credit for all prior service.

17. As a direct result of the aforesaid breach of contract, plaintiff has been damaged in a sum in excess of \$200,000.00, for which McKay, Brady and the other members of the

11a

class are jointly and severally liable to plaintiff.

SECOND CLAIM *PE*

18. Plaintiff realleges each and every allegation of paragraphs 1 through 16 as if fully set forth herein.

19. The promises described in paragraphs 7, 8 and 9 were made by McKay and Brady on behalf of the class in the reasonable expectation that such promises would induce plaintiff to undertake action of a definite and substantial nature.

20. Plaintiff was induced by said promises to undertake substantial and definite action to his detriment and to the benefit of the class, as set forth in paragraphs 10 through 13 hereinabove.

21. Injustice can be avoided only by enforcement of said promises against McKay, Brady, and the other members of the class, all of whom are estopped from disclaiming their legal obligations to plaintiff as hereinabove described.

22. By reason of the foregoing, plaintiff has been damaged in a sum in excess of \$200,000, for which sum McKay and Brady and the other members of the class are jointly and severally liable to plaintiff under the doctrine of promissory estoppel.

THIRD CLAIM *Tork*

23. Plaintiff realleges each and every allegation of paragraphs 1 through 16.

24. McKay and Brady, when making the promises on behalf of the class set forth in paragraphs 7, 8 and 9 hereinabove, had no intention of fulfilling them or attempting to fulfill said promise, and wilfully misrepresented their states of mind in this

respect to plaintiff with the intention that he rely on said misrepresentations to his detriment and to the benefit of McKay, Brady and the other members of the class.

25. Plaintiff reasonably relied on said misrepresentations to his detriment, as described in paragraphs 10 through 13 hereinabove.

26. The conduct of McKay and Brady as herein described was wantonly dishonest, evincing a high degree of culpability and moral turpitude.

27. By reason of the foregoing, plaintiff has been damaged in a sum in excess of \$200,000.00, for which said defendants and the other members of the class are jointly and severally liable to plaintiff.

WHEREFORE, plaintiff demands judgment against McKay and Brady and the other members of the class, jointly and severally in a sum in excess of \$200,000.00, together with interest, attorneys' fees, and the costs and disbursements of this action; further, plaintiff demands judgment against McKay and Brady and the other members of the class, jointly and severally in the additional sum of \$200,000.00, representing punitive and exemplary damages.)

ANDERSON RUSSELL KILL & OLICK, P.C.

By John H. Doyle Jr.

A Member of the Firm
Attorneys for Plaintiff
630 Fifth Avenue
New York, New York 10020
(212) 397-9729

12a

134

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
REGINALD V. SCHMIDT,

Plaintiff,

ANSWER
TO
SECOND AMENDED
COMPLAINT

-v

RAYMOND T. MCKAY and JOHN F. BRADY,
each individually and as representatives of
a class of persons who were members of
District 2 - Marine Engineers Beneficial
Association - AFL-CIO in September 1971.

72 Civ. 1595 (WB)

Defendants.

-----x
Raymond T. McKay, individually and in his purported
capacity as representative of a class of persons who were members of
District 2 Marine Engineers Beneficial Association, AFL-CIO in
September, 1971, and John F. Brady, individually and in his purported
capacity as representative of a class of persons who were members of
District 2 Marine Engineers Beneficial Association, AFL-CIO in
September, 1971, file the within Answer to the Second Amended Com-
plaint in this matter as follows:

FIRST DEFENSE

1. It is admitted that plaintiff is a citizen of the State
of Florida. It is admitted that defendant Raymond T. McKay is a
citizen of the State of New Jersey. It is denied that defendant John F.
Brady is a citizen of the State of New York. It is denied that the matter
in controversy exceeds, exclusive of interest and costs, the sum of
Ten Thousand (\$10,000.00) Dollars. It is denied that this Court has

Jurisdiction of this action under Title 28 U. S. C., Section 1332.

2. The allegations of the first sentence of Paragraph 2 of the Second Amended Complaint are admitted. The allegations of Paragraph 2 of the Second Amended Complaint wherein it is alleged that the then defendants consist of all the persons who were members of MEBA in September 1971 and that the word "class" as hereinafter used refers to McKay, Brady and said other defendants are denied.

3. It is admitted that plaintiff was a member in good standing of Local 33, Marine Engineers Beneficial Association from January 16, 1946 to June 30, 1950. It is denied that Local 33 Marine Engineers Beneficial Association was a predecessor union of District 2 Marine Engineers Beneficial Association ("MEBA"). It is admitted that since May 15, 1958 plaintiff has been a member in good standing of MEBA to the date of the filing of the original Complaint herein.

4. After reasonable investigation defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 4 of the Amended Complaint, except to admit that MEBA had no collective bargaining agreement with Cities Service and therefore deny same and demand proof thereof at time of trial.

5. Defendants deny the allegations of Paragraph 5 of the Amended Complaint. Defendants further deny that the allegations of Paragraph 5 of the Amended Complaint fulfill the requirements of Rule 23.2 and Rule 23 of the Federal Rules of Civil Procedure.

6. The allegations of Paragraph 6 of the Amended Complaint are admitted.

7. It is admitted that defendants McKay and Brady sought the active support of plaintiff and all other engineers of Cities Service for the campaign of District 2 Marine Engineers Beneficial Association to organize licensed marine engineers employed aboard vessels of Cities Service. It is denied that plaintiff promised McKay and Brady that he would actively support MEBA if MEBA would assure him full pension rights upon retirement regardless of the outcome of MEBA's campaign. It is denied that in order to induce plaintiff to lend his active support to the campaign McKay orally promised plaintiff that, whether or not MEBA successfully organized Cities Service, MEBA would assure inclusion of plaintiff in the MEBA Pension Plan with full benefits therein for plaintiff upon his retirement.

8. It is admitted that defendant McKay wrote the letter attached to the Second Amended Complaint as Exhibit A and the letter was sent from New York. The balance of the allegations of Paragraph 8 of the Second Amended Complaint are denied.

9. It is admitted that defendants McKay and Brady wrote the letter attached to the Second Amended Complaint as Exhibit B. The balance of the allegations of Paragraph 9 of the Amended Complaint are denied.

10. Defendants deny the allegations of Paragraph 10 of the Second Amended Complaint.

11. Defendants deny the allegations of Paragraph 11 of the Second Amended Complaint.

12. Defendants deny the allegations of Paragraph 12 of the Second Amended Complaint.

13. It is admitted that in 1971 plaintiff submitted an

application to the District 2 MEBA Pension Plan for a pension. It is denied that at the time of his retirement, or at any time, plaintiff was fully qualified for complete pension benefits under the terms of the said District 2 MEBA Pension Plan.

14. The allegations of Paragraph 14 are admitted.

15. The allegations of Paragraph 15 of the Second Amended Complaint are denied.

16. The allegations of Paragraph 16 of the Second Amended Complaint are denied.

17. The allegations of Paragraph 17 of the Second Amended Complaint are denied.

SECOND CLAIM

18. Defendants repeat herein their answers to the allegations of Paragraphs 1 through 16 as if fully set forth herein.

19. The allegations of Paragraph 19 of the Second Amended Complaint are denied.

20. The allegations of Paragraph 20 of the Second Amended Complaint are denied.

21. The allegations of Paragraph 21 of the Second Amended Complaint are denied.

22. The allegations of Paragraph 22 of the Second Amended Complaint are denied.

THIRD CLAIM

23. Defendants repeat each and every allegation of their answers to Paragraphs 1 through 16 of the Second Amended Complaint as if fully set forth herein.

24. The allegations of Paragraph 24 of the Second Amended Complaint are denied.

25. The allegations of Paragraph 25 of the Second Amended Complaint are denied.

26. The allegations of Paragraph 26 of the Second Amended Complaint are denied.

27. The allegations of Paragraph 27 of the Second Amended Complaint are denied.

SECOND DEFENSE

28. There was no binding contract between plaintiff and defendants which is enforceable in this Court.

29. Plaintiff does not allege any acceptance of defendants' alleged promise to plaintiff or any agreement so as to constitute a valid contract upon which this action can be brought.

THIRD DEFENSE

30. There was no valid consideration for defendants' alleged promise to plaintiff.

FOURTH DEFENSE

31. Plaintiff has failed to join as a defendant an indispensable party to this action, District 2 Marine Engineers Beneficial Association. The individual defendants were at all times officers, representatives and agents of the said District 2 Marine Engineers Beneficial Association.

FIFTH DEFENSE

32. This Court does not have jurisdiction over this action between plaintiff and the proper or indispensable party defendant.

SIXTH DEFENSE

33. Plaintiff's claims are barred by the applicable statute of limitations.

SEVENTH DEFENSE

34. Any promise made by the individual defendants must be considered in the light of the circumstances in which it was allegedly made. Any such promise was a campaign promise and is unenforceable since no valid or binding contract was created.

EIGHTH DEFENSE

35. The Second Amended Complaint fails to set forth a claim upon which relief can be granted.

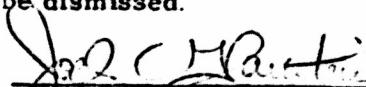
NINTH DEFENSE

36. Any alleged promise made by one or more of the defendants was impossible of performance or fulfillment because authority to accept contributions and pay pensions is exclusively in the Trustees of the District 2 MEBA Pension Plan under the Agreement and Declaration of Trust and the Rules and Regulations of the Plan.

TENTH DEFENSE

37. Under the Agreement and Declaration of Trust and Rules and Regulations of the District 2 MEBA Pension Plan, the Trustees have no power or authority either to accept contributions from District 2 MEBA on behalf of the plaintiff or to pay a pension to the plaintiff.

WHEREFORE, defendants respectfully request that the Second Amended Complaint herein be dismissed.


Joel C. Glanstein, Esq.
Markowitz & Glanstein
50 Broadway
New York, New York 10004
Telephone: (212) 943-6148
Attorneys for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

REGINALD V. SCHMIDT, : 72 Civ. 1595 (WB)

Plaintiff, : STIPULATION AMENDING
v. : SECOND AMENDED COMPLAINT

RAYMOND T. MCKAY and JOHN F. BRADY, :
each individually and as representa- :
tives of a class of persons who were :
members of District 2 - Marine En- :
gineers Beneficial Association - :
AFL-CIO in September 1971, :
Defendants. :
:-----x

IT IS HEREBY STIPULATED AND AGREED by and between
Anderson Russell Kill & Olick, P.C., attorneys for the plaintiff
herein and Markowitz & Glanstein, attorneys for the defendants
herein as follows:

1. Paragraph 17 of the Second Amended Complaint
shall be amended to read as follows:

"As a direct result of the aforesaid breach
of contract, plaintiff has been damaged in
a sum in the amount of \$24,672.04
representing pension payments due plaintiff
for the period March 1, 1971 through
December 31, 1975 for which McKay, Brady
and the other members of the class are
jointly and severally liable to plaintiff."

2. Paragraph 22 of the Second Amended Complaint
shall be amended to read as follows:

"By reason of the foregoing, plaintiff has
been damaged in a sum in the amount of
\$24,672.04 for which sum McKay and
Brady and the other members of the class
are jointly and severally liable to plain-
tiff under the doctrine of promissory
estoppel."

3. Paragraph 27 of the Second Amended Complaint shall be amended to read as follows:

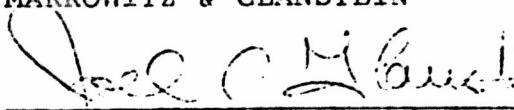
"By reason of the foregoing, plaintiff has been damaged in a sum in the amount of \$24,672.04 for which said defendants and the other members of the class are jointly and severally liable to plaintiff."

4. The ad damnum clause will be amended to read as follows:

"WHEREFORE, plaintiff demands judgment against McKay and Brady and the other members of the class, jointly and severally in a sum in the amount of \$24,672.04 together with interest, attorneys' fees, and the costs and disbursements of this action."

ANDERSON RUSSELL KILL & OCLICK, P.C.

BY: _____
A Member of the Firm
Attorneys for Plaintiff
630 Fifth Avenue
New York, New York 10020
(212) 397-9729

MARKOWITZ & GLANSTEIN

BY: _____
A Member of the Firm
Attorneys for Defendants
50 Broadway
New York, New York 10004
(212) 943-6148

SO ORDERED:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

REGINALD V. SCHMIDT, :

Plaintiff, :

-against- :

RAYMOND T. MCKAY and JOHN F. BRADY, :
each individually and as representat- :
ives of a class of persons who were :
members of District 2 Marine Engin- :
eers Beneficial Association, AFL-CIO, :

72 C 1595

August 5, 1975

Defendants. :

:

MEMORANDUM AND ORDER

BRUCHHAUSEN, D. J.

The plaintiff moves for an order, pursuant to Rule 23.2 of the Federal Rules of Civil Procedure, determining that the defendants, RAYMOND T. MCKAY, and, JOHN F. BRADY, will fairly and adequately protect the interests of the class.

The defendants cross-move for an order dismissing all claims against them individually on the various grounds as indicated in their notice of motion.

It is conceded that the defendants would ordinarily fairly and adequately protect the interests of the class.

The issue presented to the court is whether the representatives of the class would so defend if simultaneously they are being sued individually.

The affidavits of the named defendants, McKay and

BRADY allege substantially that because of their respective positions as elected officers of M.E.B.A., they would ordinarily adequately and fairly protect the interests of its members. However, because of possible substantial personal liability as a result of being sued individually, a conflict of interest would arise between the affiants and the union members in their respective defenses.

In Carroll v. American Federation of Musicians of United States and Canada, 372 F. 2nd 155, the court held in part at page 162:

"In a true class action, all the members of the class, including those absent, are bound by the judgment. Cases cited. Therefore, the interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members. Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940). Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action."

In Polak v. Noel Industries, Inc., 64 F.R.D. 333 (1974), the court held in part at page 336:

"xxx The core of defendant's argument on this point is that named plaintiff's interests may be antagonistic to those of the class which she seeks to represent, thus putting into question her ability to fairly represent the class. This Court, in this regard, must consider not only actual but also potential conflicts of interest which might arise between named plaintiff and her class during the course of the litigation."

Upon due deliberation, the court rules that the position of the defendants is sound.

Therefore, the court orders that this cause proceed as a class action, and that all claims against the individual defendants, MCKAY and BRADY, are dismissed.

This case is scheduled for trial November 3, 1975 at 10 A.M. in this part.

It is so ordered.

Copies hereof shall be forwarded to the respective attorneys.

Senior U.S.D.J.

LEGAL FILE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

REGINALD V. SCHMIDT, :
Plaintiff, :
-against- : No. 72 C 1595
RAYMOND T. MCKAY and JOHN F. :
BRALEY, each individually and as :
representatives of a class of :
persons who were members of :
District 2 Marine Engineers :
Beneficial Association, AFL-CIO :
in September 1971, :
Defendants. :
----- x

Appearances:

ANDERSON, RUSSELL, KILL & OLICK, ESQS
Attorneys for Plaintiff
JOHN H. DOYLE, III, ESQ
SCOTT B. LUNIN, ESQ
Of Counsel

MARKOWITZ & GLANSTEIN, ESQS
Attorneys for Defendants
JOEL C. GLANSTEIN, ESQ
Of Counsel

SMITH & KURLANDER, ESQS
Attorneys for Defendants,
Francis W. Keeley, Carl L. Sorensen,
Jesse E. Melton and Vahram Guzelian

BRUGMHAUSEN, D. J.

The defendants move for an order, pursuant to Rule 12, and 56, of the Federal Rules of Civil Procedure, dismissing the second amended complaint, on the ground that the causes of action were commenced outside of the applicable statute of limitations, or, in the alternative, that Rule 23.2 of the Federal Rules of Civil Procedure is unconstitutional.

The second amended complaint alleges in substance that during May 1966, the District 2-Marine Engineers Beneficial Association, (MEBA), campaigned to organize the Cities Service Engineers. The complaint contains various allegations between the plaintiff and the individual defendants on behalf of the unincorporated association, MEBA, wherein the plaintiff agreed to support MEBA'S campaign to organize the Cities Service Engineers. In return for this support, the plaintiff would be included in the MEBA pension plan upon his retirement. The complaint in paragraphs 3 and 9 allege additional written inducements to the plaintiff for his support of the campaign. Thereafter,

in reliance upon these promises and inducements, the plaintiff alleges in paragraph 10, that he took over the direction of a picket line on behalf of NEBA, at the S.S. "Bradford Island," a Cities Service vessel docked at Mobile, Alabama, from October 26, 1966 to November 16, 1966. This strike action successfully afforded NEBA to organize the Engineers and Mates aboard said vessel. The plaintiff was advised that as a result of his actions he was offered a position lower than his original employment, and as a result of this demotion, resigned his employment with Cities Service. The plaintiff thereafter retired, and on September 1, 1971, was informed that he was not eligible for a pension. Finally, the defendants breached their contract in failing to conclude with the defendants an arrangement whereby plaintiff would be included in the pension plan with full credit for all prior service; make the appropriate contributions on behalf of the plaintiff with the result that he would be included in the pension plan with full credit for all prior service; or otherwise assure that he would receive all benefits afforded by the

pension plan with full credit for all prior service, all to plaintiff's damages.

Thereafter, on November 27, 1972, this action was commenced by the filing of a complaint in this court.

It is conceded that in contract actions, the statute of limitations commences to run when the right of action accrues, that is when there is a breach thereof. However, there are situations where a claim for breach of contract arises upon the occurrence of the harm as a result of the breach. See Lewis v. Lewis, 299 N.Y.S.2d 755; 59 Misc. 2d 525, and the cases cited therein.

The plaintiff urges that there could be no breach by the defendants prior to the retirement of the plaintiff, at which time he was denied pension benefits, thereby suffering injury as a result of the breach.

The defendants urge that the plaintiff suffered immediate damage by the failure of the defendants to fulfill their promises contained in the letters signed by the individual defendants, annexed to the original complaint, and incorporated by reference in the second amended complaint.

The affidavit of Thomas J. Mackell, Jr., the Administrator

BEST COPY AVAILABLE

of the pension plan, states that employees are entitled to periodical requests from the plan, a certification of their earned pension credits. This certification enables an employee to determine for himself time necessary for a normal pension. The plaintiff applied for his pension February 1971 and was declared ineligible since his credited service amounted to four years.

The first cause of action founded upon contract is subject to the six-year statute of limitations commencing November 16, 1966.

There is no doubt that the plaintiff's opportunity to enforce his agreement commenced on November 16, 1966, the date when the strike action concluded successfully for MEBA in organizing the Engineers and Mates aboard the vessel, S.S. "Bradford Island." The plaintiff had every right to attempt enforcement of the defendants alleged promises as early as November 16, 1966. He was free to attempt enforcement of defendants alleged promises to provide plaintiff with full credit for his past service. He was free to commence an action immediately upon his

fulfillment of picket duty in Alabama. His obligation was to seek a certification from the pension plan which would have informed the plaintiff of his credits, and then be able to sue for credits for past service if denied by virtue of the alleged promises of the defendants.

The second cause of action, founded upon the doctrine of Promissory Estoppel is also subject to the six-year statute of limitations, commencing November 16, 1966.

The third cause of action, founded upon Fraud and Misrepresentation is also subject to the six-year statute of limitations. The court concludes that the facts presented clearly indicate that fraud, if any, could have been discovered with reasonable diligence commencing November 16, 1966.

In conclusion, the court rules that all of the alleged causes of actions are time barred. They were commenced November 27, 1972, outside the six-year statute of limitations which commenced November 16, 1966.

The second amended complaint is dismissed.

It is so ordered.

Copies hereof will be forwarded to the attorneys
for the parties.

Walter Bruchmann
Senior U. S. D. J.

1 mkds

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 REGINALD V. SCHMIDT,

6 Plaintiff,

7 -vs- : 72 Civ. 1595
: (WB)

8 RAYMOND T. MCKAY and JOHN F. BRADY,
each individually and as representa-
9 tives of a class of persons who were
members of District 2 - Marine
10 Engineers Beneficial Association -
AFL-CIO in September 1971,

11 Defendants

12 -----x

13

14 Deposition of the plaintiff, REGINALD V.
15 SCHMIDT, taken by the defendants pursuant to
16 stipulation and agreement of counsel at the
17 offices of Anderson, Russell, Kill & Olick, P.C.,
18 Esqs., 630 Fifth Avenue, New York, New York,
19 on April 10, 1975 at 10:00 a.m., before
20 Morris I. Kligman, a Certified Shorthand Reporter
21 and Notary Public of the State of New York.

22

23

24

25

31a

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4500

2 APPEARANCES:

3 ANDERSON, RUSSELL, KILL & OICK, P.C., ESQ.,
4 Attorneys for the Plaintiff
5 630 Fifth Avenue
6 New York, N.Y.
7 BY: JOHN H. DOYLE, III, ESQ., of Counsel

8 MARKOWITZ & GLANSTEIN, ESQS.,
9 Attorneys for the Defendants
10 50 Broadway
11 New York, N.Y. 10004
12 BY: JOEL C. GLANSTEIN, ESQ., of Counsel

13

14

15

16

17

18

19

20

21

22

23

24

25

2 IT IS HEREBY STIPULATED AND AGREED, by and
3 between the attorneys for the respective parties
4 herein, that the sealing, filing and certification
5 of the within deposition are hereby waived.

6 IT IS FURTHER STIPULATED AND AGREED, that
7 all objections, except as to the form of the
8 question, are reserved to the time of trial.

9 IT IS FURTHER STIPULATED AND AGREED, that
10 the witness may sign his deposition before any
11 duly qualified Notary Public.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

2 R E G I N A L D V. S C H M I D T, residing at
3 Route 1, Box 103, Marianna, Florida, called as
4 a witness, being first duly sworn by the Notary
5 Public, testified as follows:

81 6 EXAMINATION BY MR. GLANSTEIN:

7 Q Mr. Schmidt, in addition to the address
8 you have given in Marianna, Florida, is there any
9 other address in any state of the United States in
10 which you maintain a residence?

11 A No.

12 Q How long have you lived in Marianna, Florida?

13 A Since March 1960.

14 Q Are you presently employed?

15 A No. I am on vacation. I am employed with
16 American Trading & Transportation Company.

17 Q Are you employed in a shore side position
18 or in a seagoing position?

19 A Seagoing.

20 Q What is your position?

21 A First engineer.

22 Q Do you have a permanent assignment as first
23 assistant engineer?

24 A No. I was supposed to have but they just
25 laid up two ships, and I don't know what I am now.

2 Q Now in Paragraph No.7 you referred to
3 Mr. McKay having given you an oral promise.

4 Between May 12, 1966 and 1971 did you ascertain
5 if this promise -- if this alleged promise was fulfilled
6 by either Mr. McKay or Mr. Brady?

7 A By the letter they sent me, yes -- the
8 letter Mr. McKay sent me.

9 Q Well aside from that letter did you do any-
10 thing, without in any way commenting on the validity
11 or the quality of the letter -- my question is, aside
12 from your receipt of the letter of May 12, 1966, did
13 you, on your own, undertake any efforts to confirm
14 that whatever was stated in the letter was in fact
15 accomplished?

16 (Mr. Doyle confers with the witness off
17 the record)

18 MR. DOYLE: Do you understand the question?

19 THE WITNESS: In a way I do.

20 Q Well, answer the question to the best of
21 your ability. If you do not understand it, I will try
22 to rephrase it for you.

23 (Mr. Doyle confers with the witness off
24 the record)

25 MR. GLANSTEN: I want to note on the

2 record again that I object to Mr. Doyle conferring
3 with his client before answering the question. I
4 think that the witness has amply demonstrated his
5 ability to state whether or not he can understand a
6 given question, and Mr. Doyle, when he feels a question
7 is objectionable has amply indicated his ability to
8 state his objection.

9 I object to your conferring with your
10 client before he answers.

11 MR. DOYLE: I want the record to note that
12 I asked the witness simply whether he understood the
13 question and stated to him simpler terms what the
14 question was, and it is my position that that is not
15 objectionable.

16 MR. GLANSTEIN: I think it is improper,
17 and I object to it.

18 Will you please read the question.

19 (Question read by the reporter)

20 A I stopped into the union hall --

21 Q May I interrupt you and ask you to pinpoint
22 which hall.

23 A The MERA District 2 Hall in Brooklyn.

24 Q And when did you do that?

25 A The end of November -- no, I don't remember

2 the exact date.

3 Q Will you tell us the year.

4 A I can't even tell that. It was either
5 '69 or '70.

6 Q What happened there?

7 A The only man there at the time was Mr. Pernnisi.

8 Q Did you have a conversation with him?

9 A Yes, I did.

10 Q Will you tell me what was said by you and
11 by him.

12 A Well, I can't tell the exact words but I
13 asked him if Mr. Brady or Mr. McKay were in, I would
14 like to speak to them about my retirement and how I was
15 going to go about collecting it.

16 He said he didn't know anything about it, that
17 Mr. Brady wasn't there, and Mr. McKay wasn't there.

18 At about that time the telephone rang and
19 Mr. Pernnisi said it was Jack Brady on the telephone,
20 and he told Mr. Brady that I was asking questions about
21 my retirement, and that he could not answer the questions.

22 Q "He" meaning who?

23 A Mr. Pernnisi.

24 Q Yes?

25 A And would Jack Brady like to speak to me.

2 I don't know what the answer was but Mr. Brady
3 did not speak to me. He said he would be in the office
4 the next day.

5 Well, I am not financially able to hang around
6 New York day after day to see anybody.

7 Q I see.

8 A So I returned home, and I have called
9 Mr. Brady on several occasions.

10 Q Subsequent or prior to that?

11 A After that, and I have called Mr. McKay
12 several times, and I have never been able to get in
13 contact with either one; and before that date I could
14 pick up the telephone and call a number in New York and
15 get in touch with Mr. Brady in a few minutes.

16 Q Now did you ever have any other dealings
17 with Mr. Pernissi regarding what was contained in the
18 May 12, 1966 letter --

19 A No.

20 Q -- other than that episode that you just
21 testified about?

22 A No.

23 Q I would like to show you a series of docu-
24 ments which were marked Plaintiff's Exhibit 4 in the
25 deposition of John F. Brady, and I ask you to examine

2 A Yes.

3 Q -- in the first sentence of Paragraph 12?

4 A Yes.

5 Q Can you tell me the manner or means by
6 which you believe you were in considerable danger
7 your person with respect to the actions you took vis-a-
8 vis the BRADFORD ISLAND?

9 A We were at the end of a very desolate
10 road -- Water Street in Mobile, Alabama, and there
11 were several ships tied up there. Two of them were
12 dead, with no guards or anything on board, and there
13 was considerable theft going on on board these ships,
14 and it was so bad that the Mobile police were patrolling
15 there pretty near hourly, day after day and all night,
16 with dogs, and I don't like the idea of working and
17 being in a place where a dog could get at you.

18 Q Well, were the dogs held at bay by the
19 police?

20 A They were kept in the back of their cars,
21 and if they had ever been let out I don't know whether
22 the police would have enough control over them or not
23 to make them do exactly as they wanted to.

24 Q You also refer in Paragraph No.12 of your
25 second amended complaint to the alleged great risk to

40a

2 your future employment by Cities Service.

3 Can you tell me what the basis for that allega-
4 tion is at that time?

5 A Well I had refused to sign on on the ship
6 several months before that.

7 Q And what was done, if anything, by the company?

8 A Nothing was said then. This all adds up,
9 and at the time when they called me to come back to
10 work, the personnel relations manager did not call me;
11 he had his assistant call me.

12 Q May I just interrupt you to pinpoint the
13 time? You say "at the time". Are you talking about
14 in November of 1966 or in May when you said you re-
15 fused to sign on? You said "at that time".

16 A Well, this was around the Mobile time.

17 Q Around the time that you had been involved
18 with the BRADFORD ISLAND?

19 A That is right.

20 Q You received a phone call from the company?

21 A Yes. Now whether it was before, during or
22 after I don't remember, but I was informed that I had
23 the second engineer's job available.

24 Q Do you recall who it was that so informed
25 you?

41a

2 Q Did you have a reason for disliking Mr.
3 Williams or not wishing to sail with him?

4 A Yes.

5 Q What was the reason?

6 A Mr. Williams had a heart condition. He had
7 a letter from the company saying he was not to do any
8 physical labor.

9 The first engineer has to do a lot of physical
10 work, and I have sailed with Mr. Williams prior to this
11 time as second assistant engineer, and I was doing the
12 second assistant's work and I was doing the first
13 engineer's work, too, and Mr. Williams was sitting
14 back taking life easy, and I was doing his work and
15 he was collecting first engineer's salary, and I was
16 told at that time "Take it or leave it."

17 Q In your conversation with this assistant.

18 A That is correct.

19 Q So I assume you indicated that you would
20 leave it.

21 A Yes, sir.

22 Q Now you allege in paragraph number 12 that
23 you were demoted.

24 Did Mr. Lieblein's assistant say that this
25 is a demotion, in his conversation with you?

42a

2 A No.

3 Q Did he indicate to you that you would never
4 receive any further employment opportunities --

5 A No.

6 Q -- with Cities Service?

7 A Yes.

8 Q Would you explain that? You first indicated
9 "no" and then you said "yes".10 Q What was it exactly that was said to you which
11 would indicate one way or the other whether you would
12 have further employment opportunities with the Cities
13 Service?

14 A He said "Take it or leave it".

15 Q Well isn't it a fact, Mr. Schmidt, that Mr.
16 Lieblein's assistant never told you "If you don't take
17 this job I will never give you another one"?18 A I don't believe he had the authority to do
19 that.20 Q But whether he had the authority or not he
21 did not say that to you, did he?22 A All he said was "That's the job. Take it or
23 leave it."24 Q Did you ever receive a communication from
25 anyone else in Cities Service subsequent to the tele-

1 mkg 7 Schmidt
2 phone conversation, either orally or in writing, wherein
3 your employment opportunities with Cities Service were
4 terminated?

5 A I was never offered a job with Cities Service
6 again after that.

7 Q Well, what was the procedure by which you
8 obtained jobs with Cities Service up until that time?

9 A They called me from the office.

10 Q Did you ever call them and indicate that
11 you wanted to come back, from a vacation or a leave
12 of absence?

13 A They usually called me before I was ready to
14 come up.

15 Q That is not my question, Mr. Schmidt. My
16 question is did you ever --

17 A Had I ever called them?

18 Q --ever called Cities Service, from 1947 to
19 1966, and indicate to them that you were available
20 for employment?

21 A Yes.

22 Q And did you receive a job following that
23 indication to the company?

24 A Yes.

25 Q Now you just testified that you never received

410

1 mkg 8

Schmidt

2 any further calls from the company after this telephone
3 conversation; correct?

4 A Up to a certain date.

5 Q What was that date?

6 A Since I left the union.

7 Q Which union?

8 A MEBA, District 2.

9 Q Well we are talking about the period up
10 to November 1966 right now.

11 A Yes, I know you are.

12 Q Subsequent to November of 1966 and while you
13 were a member of District 2 MEBA, did you ever call or
14 communicate in any way with Cities Service to seek
15 further employment with that company?

16 A I have already answered that question.

17 Q I don't believe you have.

18 MR. GLANSTEIN: Mr. Doyle, do you recall
19 whether the witness specifically answered that question?

20 MR. DOYLE: As to subsequent to November
21 1966.

22 MR. GLANSTEIN: Yes, while he was a member of
23 District 2 MEBA.

24 MR. DOYLE: I don't recall. I have no
25 recollection of your answering that.

42a

1 mkcg 9 Schmidt

2 A Yes.

3 Q When did you do that?

4 A I had been injured. I had been burned on a
5 ship. I was in the hospital and I was home on leave --

6 Q Well wait a minute. I don't mean to be im-
7 polite, Mr. Schmidt, but I do not think you understand
8 the time frame that I am referring to -- from November
9 1966 through 1971.

10 A November 1966?

11 Q Through 1971. That is the period I am referring
12 to.

13 A Have I called them asking for a job?

14 Q Yes, or communicating with them asking for
15 a job.

16 A From November 1966? I don't believe so.

17 (At this juncture a short recess was taken.)

18 MR. GLANSTEIN: What was the last question?

19 (Record read by the reporter.)

20 A Isn't there a final date on that?

21 Q During early 1970.

22 When did you formally cease being a member of
23 District 2 MEBA, Mr. Schmidt?

24 A I just let my dues lapse. I don't remember
25 what year it was. I believe it was January 1, 1972.

43a

1 nkcg 10 Schmidt

2 I believe -- I am not sure.

3 Q When you were involved in this action with
4 the Bradford Island, did you and Mr. Richardson have
5 any discussions regarding possible pension benefits
6 that you would be entitled to from District 2 MEBA
7 pension plan?

8 A Yes.

9 Q Can you tell me what the conversation or
10 conversations were?

11 A Well I had asked him how they would go about
12 it and he said they didn't know or he didn't know.

13 Q When you say "How they would go about it" --
14 what was "it"?

15 A How would the union go about paying me this
16 pension, and he said he didn't know. And I mentioned
17 that Mr. McKay said I would be entitled to a pension,
18 and he said "If Mr. McKay says so you'll get it".

19 Q How did you lead into the conversation?

20 A Talking, just conversation.

21 Q Did you bring up the subject of a pension or
22 did Mr. Richardson?

23 A I don't remember.

24 Q Now you assert in paragraph 12 of your second
25 amended complaint that you were forced to quit your

1 mkcg 11 Schmidt

2 employment with Cities Service.

3 Is it true that after you left your employment
4 with Cities Service, whether by being forced to quit or
5 otherwise, you commenced working under District 2
6 contracted vessels?

7 A That's right.

8 Q You had already been a member of District 2
9 for sometime, had you not?

10 A Yes.

11 Q Were you paying dues to DOA as well as to
12 District 2 while you were employed by Cities Service?

13 A Yes. That is standard.

14 Q You did not receive any pension from Cities
15 Service at the time you left, did you?

16 A No.

17 Q Was there any discussion with any District 2
18 official at the time you started working under District
19 2 contract as to what would ensue insofar as pension
20 would be concerned?

21 A At the time I started working?

22 Q Under the District 2 contracts of November
23 or December of 1966, did you have any discussion with
24 any union officials at that time?

25 A Yes.

BEST COPY AVAILABLE

45a

444 DISTRICT COURT REPORTERS, U.S. COURT, NEW
FOLEY SQUARE, NEW YORK, N.Y. CD 7-4571

2 Q At this time you had been a member of
3 MEBA for several years; is that correct?

4 A That's right.

5 Q Did you ever receive any literature regard-
6 ing the MEBA -- by MEBA here, I mean District-2 MEBA.

7 Had since you became a member of District 2-MEBA ever
8 received any literature or information regarding the
9 details of the District 2-MEBA Pension Plan?

10 A Yes.

11 Q From whom did you receive this information?

12 A Probably the pension plan was sent to my
13 home.

14 Q Prior to May 1966?

15 A I don't remember the date.

16 Q Well you were aware that there existed
17 such a pension plan prior to May 1966.

18 A Yes.

19 Q Did you understand that in order to accrue
20 credit under that pension plan you had to be employed
21 by employers under contract with District 2-MEBA?

22 A Yes.

23 Q And did you know this at the time you had
24 the conversation with Mr. McKay in Corpus Cristi?

25 A Yes.

2 Q Did you know then, at the time you had your
3 person-to-person conversation with Mr. Brady at or
4 about May 12, 1966?

5 A With Mr. Brady?

6 Q Yes; on the same subject.

7 A I don't remember having a telephone conversa-
8 tion with Mr. Brady.

9 Q I did not say "telephone conversation".

10 I believe you testified that immediately prior and/or
11 right after you telephone conversation with Mr. McKay
12 you had given an indication to Mr. Brady of the same
13 kind that you had given to Mr. McKay; is that correct?

14 A You mean about the retirement?

15 Q Yes.

16 A And my guarantee of it?

17 Q Yes.

18 A Yes, sir.

19 Q Well, at the time that you had these conver-
20 sations with Mr. Brady in person you were aware of the
21 requirements of the District 2 Pension Plan employment
22 under a contracted operator.

23 MR. DOYLE: I object to the form of that
24 question.

25 MR. GLANSTEIN: I will rephrase the question.

47a

2 Q When you had these conversations with
3 Mr. Brady on or about May 12, 1966 in person, is it
4 88 I your testimony that you were aware of the requirements
5 of, the District 2 Pension Plan with regard to the
6 manner in which credits were normally accrued?

7 MR. DOYLE: I object to that on the ground
8 that it is overly general. The question should con-
9 tain some statement of what he is being asked that he
10 knew. Simply asking him whether he knew the general
11 requirements is objectionable in form.

12 MR. GLANSTEIN: I will try to rephrase the
13 question.

14 Q You have already testified, Mr. Schmidt,
15 that you knew before May 12, 1966 that in order to
16 accrue pension credits under the District 2 Pension
17 Plan you had to work for employers under contract
18 with District 2; is that correct?

19 A Yes.

20 Q So you knew when you talked to Mr. Brady
21 on May 12, or about May 12, that the requirements of
22 the District 2 Pension Plan were that in order to
23 accrue pension credit you had to work in employment
24 with a District 2 contracted employer; is that correct?

25 A Yes.

1 mkg 11 Schmidt

2 employment with Cities Service.

3 Is it true that after you left your employment
4 with Cities Service, whether by being forced to quit or
5 otherwise, you commenced working under District 2
6 contracted vessels?

7 A That's right.

8 Q You had already been a member of District 2
9 for sometime, had you not?

10 A Yes.

11 Q Were you paying dues to DCA as well as to
12 District 2 while you were employed by Cities Service?

13 A Yes. That is standard.

14 Q You did not receive any pension from Cities
15 Service at the time you left, did you?

16 A No.

17 Q Was there any discussion with any District 2
18 official at the time you started working under District
19 2 contract as to what would ensue insofar as pension
20 would be concerned?

21 A At the time I started working?

22 Q Under the District 2 contracts of November
23 or December of 1966, did you have any discussion with
24 any union officials at that time?

25 A Yes.

51a

2 Q And about your pension rights.

3 A Yes.

4 Q Who did you talk to then?

5 A Bill Gammill.

6 Q Where was Mr. Gammill's port? Did Mr.
7 Gammill have an assignment to a particular port?

8 A Houston, Texas.

9 Q And what was the discussion that you had with
10 him?

11 A I asked him several times about pension plan--
12 pension rights.

13 Q And what did he indicate to you?

14 A He indicated to me that if Mr. Brady said
15 I would get a pension I would get it.

16 Q I assume there was no discussion of the
17 details of the requirements of the pension plan.

18 A They all said they didn't know; that Mr.
19 McKay --

20 Did I say "Brady" a minute ago?

21 MR. DOYLE: You said "Brady".

22 THE WITNESS: I meant Mr. McKay -- Mr. McKay
23 would know the details.

24 Q When you left the Cities Service employment
25 did you know for a fact what was required under the

1 mkcg 13 Schmidt

2 existing District 2 pension plan in order for you to
3 receive a pension?

4 A No, I didn't.

5 Q Isn't that inconsistent with your earlier
6 testimony?

7 MR. DOYLE: Object to as argumentative.

8 I instruct the witness not to answer.

9 Q You allege in paragraph 13 of the second
10 amended complaint that at the time of your retirement
11 you were fully qualified for complete pension benefits
12 under the terms of the MEBA pension plan.

13 Is that a correct summary of your allegation
14 in paragraph 13 --

15 A Yes.

16 Q -- referring to the second sentence?

17 A Yes.

18 Q Do you know what "fully qualified for complete
19 pension benefits under the terms of the MEBA Pension
20 Plan" means?

21 A I thought I did.

22 Q Well what did you think it meant?

23 A Well, with this letter it meant I got a
24 pension (indicating).

25 Q You are pointing to plaintiff's exhibit --

53a

S: ITHERY DISTRICT COURT CLERK'S OFFICE, CINCINNATI,
FOLEY SQUARE, P.O. BOX 14400

2 A Vice-president in charge of the rivers.

3 Q And can you tell me when you first met
4 Mr. Richardson?

5 A At the picket line when I turned up there
6 in Mobile.

7 Q In or about October 26 --

8 A That is right.

9 Q -- 1966?

10 A Yes.

11 Q Can you recall whether you had any conversa-
12 tion with Mr. Richardson at that time?

13 A Yes. I told him -- he asked me who I was,
14 and I told him who I was.

15 I told him that Mr. Brady told me to come over
16 and take over the picket line.

17 He said he had been expecting me.

18 Q Was Mr. Richardson in charge or were you
19 in charge of that picket line?

20 A Mr. Richardson may have turned up there two
21 or three times after that, but I was the man who was
22 running the picket line.

23 Q Who was on the picket line besides you?

24 A Various members of the SIU union, the
25 International Union.

549

1 mkcg 10 Schmidt

2 I believe -- I am not sure.

3 Q When you were involved in this action with
4 the Bradford Island, did you and Mr. Richardson have
5 any discussions regarding possible pension benefits
6 that you would be entitled to from District 2 MEBA
7 pension plan?

8 A. Yes.

9 Q Can you tell me what the conversation or
10 conversations were?

11 A. Well I had asked him how they would go about
12 it and he said he didn't know or he didn't know.

13 Q When you say "How they would go about it" --
14 what was "it"?

15 A. How would the union go about paying me this
16 pension, and he said he didn't know. And I mentioned
17 that Mr. McKay said I would be entitled to a pension,
18 and he said "If Mr. McKay says so you'll get it".

19 Q How did you lead into the conversation?

20 A. Talking, just conversation.

21 Q Did you bring up the subject of a pension or
22 did Mr. Richardson?

23 A. I don't remember.

24 Q Now you assert in paragraph 12 of your second
25 amended complaint that you were forced to quit your

55a

SOUTHERN DISTRICT COURT
FOLEY SQUARE, N.Y. 10007
Cover 114
7-4151

RT 3 Box 436
Morrison, Pa

Mr. Brody

I don't know who to write to to
ask for the vacation slips to Bill or
Dr. Igues I will be asking you to have
or send to me. Bill Garrison gave
me a few address of Eng. & mates
that live near me to try to get in
touch with their teachers now I think they
are. I shall try to see them. I am
also going to see Frank Whit and see
if Dean talk to him. John Meyer
stopped by here while I was out and
he asked my wife if the company I
was with was still living now. I
may be you can talk to him now.

Pittsbrgh 4

Ex. 7

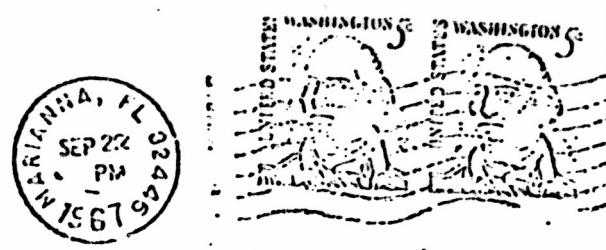
56a

I am over to the
Boys from this summer and later during
the fall and spaced around that
the union has informed the pick of my
time with C.S. for retirement and
I told them is would a big loss
I wonder if it would be any good to
get my time checked by the Coast Guard
and have the union certify my time for
retirement and will have the amount I
would receive after 23, 24 & 25 years
and have the photo of me and
wife and have photo of me and
sent to all C.S. boys will get
some thoughts back take care of you all

Respectfully
Richard Shultz

W. L. Smith
3 Box 436
San Jose, Cal.

70
70
70



Mrs J. F. BRADY
DISTRICT 2 MEBA
650 FOURTH AVE.
B'KLYN
NEW YORK 11232

58a

2 A Yes.

3 Q -- in the first sentence of Paragraph 12?

4 A Yes.

5 Q Can you tell me the manner or means by
6 which you believe you were in considerable danger to
7 your person with respect to the actions you took vis-a-
8 vis the BRADFORD ISLAND?

9 A We were at the end of a very desolate
10 road -- Water Street in Mobile, Alabama, and there
11 were several ships tied up there. Two of them were
12 dead, with no guards or anything on board, and there
13 was considerable theft going on on board these ships,
14 and it was so bad that the Mobile police were patrolling
15 there pretty near hourly, day after day and all night,
16 with dogs, and I don't like the idea of working and
17 being in a place where a dog could get at you.

18 Q Well, were the dogs held at bay by the
19 police?

20 A They were kept in the back of their cars,
21 and if they had ever been let out I don't know whether
22 the police would have enough control over them or not
23 to make them do exactly as they wanted to.

24 Q You also refer in Paragraph No.12 of your
25 second amended complaint to the alleged great risk to

50a

2 your future employment by Cities Service.

3 Can you tell me what the basis for that allega-
4 tion is at that time?

5 A Well I had refused to sign on on the ship
6 several months before that.

7 Q And what was done, if anything, by the company?

8 A Nothing was said then. This all adds up,
9 and at the time when they called me to come back to
10 work, the personnel relations manager did not call me;
11 he had his assistant call me.

12 Q May I just interrupt you to pinpoint the
13 time? You say "at the time". Are you talking about
14 in November of 1966 or in May when you said you re-
15 fused to sign on? You said "at that time".

16 A Well, this was around the Mobile time.

17 Q Around the time that you had been involved
18 with the BRADFORD ISLAND?

19 A That is right.

20 Q You received a phone call from the company?

21 A Yes. Now whether it was before, during or
22 after I don't remember, but I was informed that I had
23 the second engineer's job available.

24 Q Do you recall who it was that so informed
25 you?

2 A It was the assistant to Mr. Walter Lieblin.
3 Q In your answer to the interrogatories you
4 spelled it L-i-e-b-l-e-i-n.
5 A I have trouble spelling the man's name.
6 Q Is Mr. Lieblein an official of Cities Service
7 A Yes.
8 Q Or was he?
9 A Yes.
10 Q What was his position?
11 A Personnel relations manager, I believe.
12 Q And what ship did you receive the offer on
13 as a second assistant engineer?
14 A The Cities Service NORFOLK.
15 Q Was that the same class of vessel as the
16 COUNCIL GROVE tonnagewise?
17 A No.
18 Q Was it a newer ship?
19 A Yes.
20 Q Did it have a more up-to-date plant?
21 A Yes.
22 Q Were you familiar with that plant?
23 A Yes.
24 Q Had you had any prior experience with any
25 Cities Service ships similar to the NORFOLK?

3 Q How much experience?

4 A Four or five years.

5 Q When was the last time that you sailed on

6 a vessel like the NORFOLK?

7 A Since then?

8 Q No, at the time you received this offer

9 from Cities Service in or about October or November

10 1966 to go back as a second assistant engineer.

11 A Possibly a year before that.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

2 Q Now at the time that you were engaged in this
3 activity involving the Bradford Island was there in
4 effect a collective bargaining agreement covering the
5 engineers on Cities Service Vessels, to your knowledge?

6 A I don't know.

7 Q When was the last agreement covering the
8 Cities Service engineers effective for prior to this
9 time?

10 A I don't know that.

11 Q In the DOA Cities Services agreement covering
12 the engineers was there, to your knowledge or recollec-
13 tion, any provision pertaining to discipline or dis-
14 charge of the engineers in the bargaining agreement?

15 A I don't recollect.

16 Q And when you first joined the Cities Service
17 Fleet in 1947, Mr. Schmidt, what was the position you
18 were hired for? By that I mean 1st, 2nd, 3rd or chief?

19 A First engineer. I did not have the license,
20 though.

21 Q What was your license at the time?

22 A Second engineer.

23 Q From 1947 to 1966 did you sail only as a
24 first assistant or did you sail in different assistant
25 engineer ratings on Cities Service vessels?

1 mkcg 2

Schmidt

2 A I never sailed as first assistant for Cities
3 Service until 1952.

4 Q And from 1952 to 1966 what was the rating or
5 ratings which you sailed on for Cities Service?

6 A First engineer, second engineer.

7 Q When is the last time you sailed as second
8 assistant prior to 1966, Mr. Schmidt?

9 A I don't remember. It is on my data sheets.

10 Q Which data sheets?

11 A My discharges.

12 Q Have you provided those to your counsel?

13 A Yes, I have.

14 MR. GLANSTEIN: I request counsel to voluntarily
15 produce them.

16 MR. DOYLE: May the record reflect that I
17 am turning over to Mr. Glanstein for his use in the
18 deposition a seven-page document entitled "Certificate
19 of Seaman's Service", dated in the right-hand corner
20 "29 October, 1970, Washington, D. C." -- (handing to
21 Mr. Glanstein).

22 MR. GLANSTEIN: Thank you.

23 BY MR. GLANSTEIN:

24 Q Mr. Schmidt, I want to direct your attention
25 to a Certificate of Seaman's Service, dated the 29th of

1 mkcg 3 Schmidt
2 October, 1970 which has, as the first item, service
3 on the SS Winter Hill as a second assistant engineer
4 from 9/7/59 to 9/20/59.

5 MR. DOYLE: Wait; let us do this off the
6 record first.

7 (Discussion off the record.)

8 MR. GLANSTEIN: Back on the record, please.

9 BY MR. GLANSTEIN:

10 Q And the next page, which has as the first
11 item "SS Cities Service Miami, first assistant engineer,
12 7/28/63 to 10/27/63" --

13 Do you have copies of those pages in front of
14 you?

15 A Yes.

16 Q Is it a fact that in the period 1959 through
17 1964, which is reflected on those two pages, you have
18 on a number of occasions sailed as second assistant
19 engineer?

20 A That is correct.

21 MR. GLANSTEIN: I would like to offer those
22 two documents as the next defendants' exhibits.

23 MR. DOYLE: Let us mark the whole thing.

24 MR. GLANSTEIN: That is the Certificate of
25 Seaman's Service, consisting of seven pages.

2
2
3
3
4
4
5
5
6
6
7
7
8
8
9
9
10
10
11
11
12
12
13
13
14
14
15
15
16
16
17
17
18
18
19
19
20
20
21
21
22
22
23
23
24
24
25
25

(Document consisting of seven pages marked

Defendant's Exhibit 2 for identification.)

MR. GLANSTEIN:

Q. Getting back to your conversation with Mr.

Lieblein's assistant, what was it that he specifically said to you and what was it that you specifically said to him?

A. He called me and told me that there was a job available for me on the Cities Service Norfolk,

and I asked him "What job?" And he said "Second engineer."

Q. And did you respond to that?

A. Yes, I did.

Q. And what did you say?

A. I said "How come I am going second engineer?"

He said "That's the only job available."

I says "Well who is first engineer?"

And he said "Raymond Williams."

I said "Well, I am sorry, I will not sail second assistant engineer with Mr. Williams as first engineer."

Q. Did you have a previous professional personality clash with Mr. Williams?

A. No.

2 Q Did you have a reason for disliking Mr.
3 Williams or not wishing to sail with him?

4 A Yes.

5 Q What was the reason?

6 A Mr. Williams had a heart condition. He had
7 a letter from the company saying he was not to do any
8 physical labor.

9 The first engineer has to do a lot of physical
10 work, and I have sailed with Mr. Williams prior to this
11 time as second assistant engineer, and I was doing the
12 second assistant's work and I was doing the first
13 engineer's work, too, and Mr. Williams was sitting
14 back taking life easy, and I was doing his work and
15 he was collecting first engineer's salary, and I was
16 told at that time "Take it or leave it."

17 Q In your conversation with this assistant.

18 A That is correct.

19 Q So I assume you indicated that you would
20 leave it.

21 A Yes, sir.

22 Q Now you allege in paragraph number 12 that
23 you were demoted.

24 Did Mr. Lieblein's assistant say that this
25 is a demotion, in his conversation with you?

67a

2 A No.

3 Q Did he indicate to you that you would never
4 receive any further employment opportunities --

5 A No.

6 Q -- with Cities Service?

7 A Yes.

8 Q Would you explain that? You first indicated
9 "no" and then you said "yes".10 What was it exactly that was said to you which
11 would indicate one way or the other whether you would
12 have further employment opportunities with the Cities
13 Service?

14 A He said "Take it or leave it".

15 Q Well isn't it a fact, Mr. Schmidt, that Mr.
16 Lieblein's assistant never told you "If you don't take
17 this job I will never give you another one"?18 A I don't believe he had the authority to do
19 that.20 Q But whether he had the authority or not he
21 did not say that to you did he?22 A All he said was "That's the job. Take it or
23 leave it."24 Q Did you ever receive a communication from
25 anyone else in Cities Service subsequent to the tele-

680

1 mkcg 7

Schmidt

2 phone conversation, either orally or in writing, wherein
3 your employment opportunities with Cities Service were
4 terminated?

5 A I was never offered a job with Cities Serv
6 again after that.

7 Q Well, what was the procedure by which you
8 obtained jobs with Cities Service up until that time?

9 A They called me from the office.

10 Q Did you ever call them and indicate that
11 you wanted to come back, from a vacation or a leave
12 of absence?

13 A They usually called me before I was ready to
14 come up.

15 Q That is not my question, Mr. Schmidt. My
16 question is did you ever --

17 A Had I ever called them?

18 Q --ever called Cities Service, from 1947 to
19 1966, and indicate to them that you were available
20 for employment?

21 A Yes.

22 Q And did you receive a job following that
23 indication to the company?

24 A Yes.

25 Q Now you just testified that you never received

69a

1 mkg 8 Schmidt
2 any further calls from the company after this telephone
3 conversation; correct?
4 A Up to a certain date.
5 Q What was that date?
6 A Since I left the union.
7 Q Which union?
8 A MEBA, District 2.
9 Q Well we are talking about the period up
10 to November 1966 right now.
11 A Yes, I know you are.
12 Q Subsequent to November of 1966 and while you
13 were a member of District 2 MEBA, did you ever call or
14 communicate in any way with Cities Service to seek
15 further employment with that company?
16 A I have already answered that question.
17 Q I don't believe you have.
18 MR. GLANSTEIN: Mr. Doyle, do you recall
19 whether the witness specifically answered that question?
20 MR. DOYLE: As to subsequent to November
21 1966.
22 MR. GLANSTEIN: Yes, while he was a member of
23 District 2 MEBA.
24 MR. DOYLE: I don't recall. I have no
25 recollection of your answering that.

2 A Yes.

3 Q When did you do that?

4 A I had been injured. I had been burned on a
5 ship. I was in the hospital and I was home on leave --6 Q Well wait a minute. I don't mean to be im-
7 polite, Mr. Schmidt, but I do not think you understand
8 the time frame that I am referring to -- from November
9 1966 through 1971.

10 A November 1966?

11 Q Through 1971. That is the period I am referring
12 to.

13 A Have I called them asking for a job?

14 Q Yes, or communicating with them asking for
15 a job.

16 A From November 1966? I don't believe so.

17 (At this juncture a short recess was taken.)

18 MR. GLANSTEIN: What was the last question?

19 (Record read by the reporter.)

20 A Isn't there a final date on that?

21 Q During early 1970.

22 When did you formally cease being a member of
23 District 2 MEBA, Mr. Schmidt?24 A I just let my dues lapse. I don't remember
25 what year it was. I believe it was January 1, 1972,

2 I believe -- I am not sure.

3 Q When you were involved in this action with
4 the Bradford Island, did you and Mr. Richardson have
5 any discussions regarding possible pension benefits
6 that you would be entitled to from District 2 MEBA
7 pension plan?

8 A Yes.

9 Q Can you tell me what the conversation or
10 conversations were?

11 A Well I had asked him how they would go about
12 it and he said they didn't know or he didn't know.

13 Q When you say "How they would go about it" --
14 what was "it"?

15 A How would the union go about paying me this
16 pension, and he said he didn't know. And I mentioned
17 that Mr. McKay said I would be entitled to a pension,
18 and he said "If Mr. McKay says so you'll get it".

19 Q How did you lead into the conversation?

20 A Talking, just conversation.

21 Q Did you bring up the subject of a pension or
22 did Mr. Richardson?

23 A I don't remember.

24 Q Now you assert in paragraph 12 of your second
25 amended complaint that you were forced to quit your

employment with Cities Service.

Is it true that after you left your employment with Cities Service, whether by being forced to quit or otherwise, you commenced working under District 2 contracted vessels?

A. That's right.

Q. You had already been a member of District 2 for sometime, had you not?

A. Yes.

Q. Were you paying dues to DOA as well as to District 2 while you were employed by Cities Service?

A. Yes. That is standard.

Q. You did not receive any pension from Cities Service at the time you left, did you?

A. No.

Q. Was there any discussion with any District 2 official at the time you started working under District 2 contract as to what would ensue insofar as pension would be concerned?

A. At the time I started working?

Q. Under the District 2 contracts of November or December of 1966, did you have any discussion with any union officials at that time?

A. Yes.

2 Q On what ship were you last employed?

3 A The MARYLAND TRADER.

4 Q And is that owned and operated by the American
5 Trading & Transportation Company?

6 A Yes.

7 Q How long were you employed on that ship?

8 A Approximately three months.

9 Q Previous to that employment were you also
10 employed on American Trading & Transportation Company
11 vessels?

12 A Yes.

13 Q For how long?

14 A I believe --

15 Q To the best of your recollection.

16 A It has been about the last two and a half
17 years, and it has been a period of four months one time,
18 and five months another time.

19 Q In this employment are you represented by a
20 union in collective bargaining negotiations?

21 A Yes.

22 Q What is the name of the union?

23 A I believe it is DOA -- Deep Water something.

24 Q Deep Water Officers Association?

25 A I don't know what the letters stand for.

74a

1 mkeg 11 Schmidt

2 employment with Cities Service.

3 Is it true that after you left your employment
4 with Cities Service, whether by being forced to quit or
5 otherwise, you commenced working under District 2
6 contracted vessels?

7 A That's right.

8 Q You had already been a member of District 2
9 for sometime, had you not?

10 A Yes.

11 Q Were you paying dues to DOA as well as to
12 District 2 while you were employed by Cities Service?

13 A Yes. That is standard.

14 Q You did not receive any pension from Cities
15 Service at the time you left, did you?

16 A No.

17 Q Was there any discussion with any District 2
18 official at the time you started working under District
19 2 contract as to what would ensue insofar as pension
20 would be concerned?

21 A At the time I started working?

22 Q Under the District 2 contracts of November
23 or December of 1966, did you have any discussion with
24 any union officials at that time?

25 A Yes.

75a

2 in the Cities Service fleet for engineers while you
3 were employed there?

4 A I know of two; there may have been three.

5 Q Which two do you know of?

6 A The two I remember ended in a tie.

7 Q Prior to 1966 did you have any conversa-
8 tions with Mr. Brady regarding the support to be given
9 to District 2 in connection with its attempt to or-
10 ganize the engineers of Cities Service?

11 A Yes.

12 Q When was the first such conversation that
13 you remember?

14 A I don't remember.

15 Q Was it while you were still a member of
16 BME?

17 A It had to be before that, because he talked
18 me into joining the BME.

19 Q Which would be in the late fifties, is that
20 correct?

21 A Yes.

22 [Mr. Doyle confers with Mr. Glanstein
23 off the record.]

24 Q And with respect to Mr. McKay, do you
25 recall having any conversations or communications

76a

2 1966 about what he or the union would do for you if
3 they were successful?

4 A No.

5 Q Well, what was he supposed to be honest
6 about?

7 A Talking to the man. I liked him.

8 Q Okay. In either of these first two elec-
9 tions was DOA involved?

10 A They were the other -- well, there were
11 two -- you wrote it for the DOA, MBA or none.

12 Q Did the DOA have anybody campaigning in
13 this behalf in either of these two elections which
14 ended in tie votes?

15 A Letters and phone calls from Mr. Collins.

16 Q And in Mr. Collins' letters or phone calls
17 did he give you any promises or assurances about what
18 he do if DOA was continued as the bargaining repre-
19 sentative of the Engineers?

20 A None.

21 Q Well, what was the nature of the letter?

22 A The same as any union organizer, I guess.

23 Q Do you recall any of the specifics?

24 A No, I don't.

25 Q Do you have in your custody, possession

R. V. Schmeltz
RT 3 Box 436
Marinna Me

Mr Brody

I don't know who to write to to ask for the vacation slips to build out so. I guess I will be asking you to have me sent to me. Bill Garrison gave me a few addresses of Eng. & mates that live near me to try to get in touch with. Since I don't know them I shall try to see them. I am also going to see Frank Whit and see if I can talk to him. John Meyer stopped by here while I was out and he asked my wife if the company I was with was still having men. So maybe you can talk to him now.

P X 4th
4/3/75 P

I was over to the Council House in
Bay Town this summer and later during
has the word spread around that
the union has refused to pick up my
time with C.S. for retirement and
I told them is was all a big lie.
I wonder if it would do any good to
get my time checked by the Coast Guard
and have the union certify my time for
retirement and cut down the amount I
would receive after 23, 24 & 25 years
service and for Photo's to make and
sent to all C.S. Engs. we'll get
some thought done the soon as you can

Respectfully
Richard
Whit

R.V. Schmidt
PT 3 Box 736
Marion Sh

J.S.
10/10/67



Mrs J. F. Brady
DISTRICT 2 MEBA
650 FOURTH AVE.
B'KLYN
NEW YORK 11232

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
REGINALD V. SCHMIDT,

Plaintiff, : 75 Civ. 1595 (WB)

-against- :

RAYMOND T. MCKAY and JOHN F. BRADY :
each individually and as representatives of :
a class of persons who were members of :
District 2 Marine Engineers Beneficial :
Association, AFL-CIO in September, 1971, :
----- AFFIDAVIT

Defendants.

STATE OF NEW)
: SS.:
COUNTY OF)

THOMAS J. MACKELL, JR., being duly sworn, deposes and
says:

1. I am the Administrator of the District 2 MEBA-AMO Pension
Plan (herein "Plan") and have served in this position since February, 1972.
The Plan is a jointly administered Taft-Hartley Trust having an equal number
of Trustees designated by certain employers having collective agreements
with District 2 MEBA-AMO, AFL-CIO. I am submitting this affidavit at the
request of the Plan's counsel who is, I am informed, also counsel to
District 2 MEBA-AMO, AFL-CIO.

2. Prior to my service as Administrator I served as Deputy
Administrator for this Plan effective August, 1968.

3. In the course of my duties as Administrator of the Plan I
oversee the recording and documentation of service in covered employment
of members of District 2 MEBA-AMO, AFL-CIO arising from the employ-
ment of these individuals as licensed marine engineer officers on oceangoing
vessels under contract to the District 2 MEBA-AMO, AFL-CIO.

4. As these individuals accumulate credited service under the Plan, they are entitled to periodically request from the Plan a certification by the Administrator of their earned pension credits.

5. Certification of pension credits is extremely important and useful since a certification will enable the individual who receives same (and his beneficiaries) to rely on the certification to establish the amount of pension credits the individual has under the Plan's Trust Indenture and Rules and Regulations.

6. When certification is accomplished an individual can then determine for himself how much additional employment under District 2 MEBA-AMO collective agreements, if any, must be had to qualify for a normal pension (20 years credited service) or continue working in the industry for a longer period to secure pension benefits of greater value.

7. Reginald Schmidt applied for a pension from the Plan in February, 1971. At that time, Reginald Schmidt was declared ineligible since his credited service amounted to only 4 years.

8. If Mr. Schmidt had applied for certification in September, 1967, he would have been certified by the Plan for three-quarters (3/4) of one year of credited service, at that time.

9. By declining to seek certification in September, 1967 and continuing in covered employment under District 2 MEBA-AMO collective agreements until October 9, 1970 (vacation benefits and disability benefits extended his eligibility through March 5, 1971) when he determined to "retire" Reginald Schmidt accrued 4 years additional pension credit under the Plan, but was, as noted in paragraph 7 herein, ineligible for a pension.

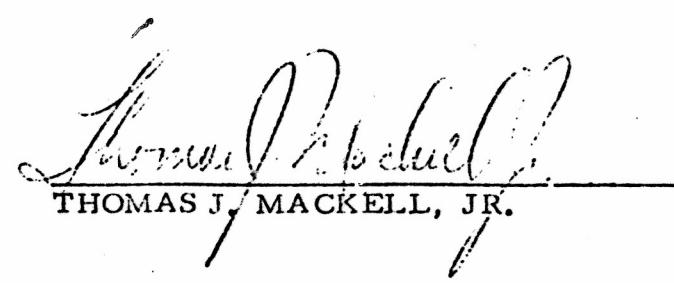
10. Reginald Schmidt thus worked from 1967 to 1971 for what, at that time, constituted no benefit to himself, and, in fact, a detriment or harm to himself, since the pension credits he accrued at that time constituted "breakage" which could be applied to the cost of other participants' pensions until at least December 31, 1975.

11. As a result of an agreement between an apparent successor to Cities Service Tankers and District 2 MEBA-AMO effective January 1, 1976 the Trustees of the Plan were able to reconsider Mr. Schmidt's application for a pension and grant him a pension effective January 1, 1976 in the amount of \$425.38.

12. Mr. Schmidt's retirement in 1971 without previously ascertaining by certification the amount of his pension credits caused him further harm, since the Plan's Trustees could not provide him with retroactive pension payments for the period April 1, 1971 through December 31, 1975. The Trustees approved Mr. Schmidt's pension application in 1976. The Trustees acted as they did because of a break in Mr. Schmidt's service to the Plan within the meaning of the Employee Retirement Income Security Act of 1974 and the Rules and Regulations of the Plan.

13. By failing to obtain a certification of his pension credits in 1967 as Mr. Schmidt knew he could do (see Exhibit 7 annexed to Defendant's initial Memorandum), Mr. Schmidt was harmed by having his pension credits treated as "breakage" for the period 1971 to 1975 since he retired himself without receipt of any pension payments from the Plan. By retiring prematurely in 1971 Mr. Schmidt also created a "break in service" which caused him to forfeit pension payments for the period April 1, 1971 to December 31, 1975 and until April, 1976 when his application was

reconsidered and approved by the Trustees effective January 1, 1976.



THOMAS J. MACKELL, JR.

SWORN to and subscribed before
me this day of June, 1976.

Eliezer R. Moss
Notary Public

ELIEZER R. MOSS (WEINGRAD)
Notary Public of New York
Reg. No. 1016263
Practiced in Kings County
Term expires March 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
REGINALD V. SCHMIDT,

Plaintiff-Appellant,

-----x
AFFIDAVIT OF SERVICE

vs.

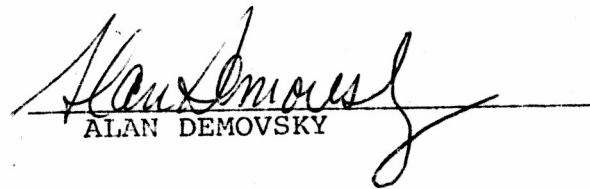
RAYMOND T. MCKAY and JOHN F. BRADY, :
representatives of a class of :
persons who were members of District :
2 - Marine Engineers Beneficial :
Association - AFL-CIO in September :
1971,

Defendants-Appellees

-----x
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

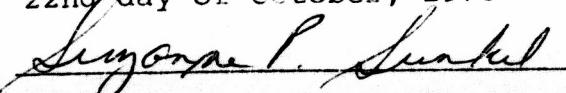
ALAN DEMOVSKY, being duly sworn, deposes and says that
he is employed by the law firm of Anderson Russell Kill & Olick,
P.C., is over the age of eighteen years and not a party to this
action.

On the 22nd day of October, 1976, deponent served true
copies of Brief of Plaintiff-Appellant together with Joint
Appendix upon Levin & Weinhaus, Esqs., 515 Olive Street, St.
Louis, Missouri 63101 and Smith & Kurlander, Esqs., 1255 Post
Street, San Francisco, California 94109 and Markowitz & Glanstein,
Esqs., 50 Broadway, New York, New York 10004 by depositing same
in a sealed postpaid wrapper in the post office box regularly
maintained by the U. S. Postal Service at 630 Fifth Avenue, New
York, New York.


ALAN DEMOVSKY

Sworn to before me this

22nd day of October, 1976



SUZANNE P. SHULTZ
NOTARY PUBLIC, State of New York
No. 41-462-28
Qualified in the County of Bronx
Commission Expires March 30, 1977